TEH GEOK HOCK

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[CRIMINAL TRIAL NO. 27 OF 1984]
21 JULY 1989

CRIMINAL LAW: *Dangerous Drugs - Section 39(B)(1)(a) of the Dangerous Drugs Act 1952 - Presumption of trafficking - Defence of self consumption - Whether presumption rebutted cautioned statement - Definition of trafficking.*

The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant never disputed the fact that at the time of his arrest he had 10 small plastic packets of heroin concealed under the front part of his underpants. The crux of his defence was that he was at the material time a drug addict and that the heroin found on his person was for his own consumption. The defence also relied on the cautioned statement of the appellant to show that he was a drug addict. In the cautioned statement itself in response to the question "why was the amount of drug found on you so much" the reply by the appellant was "because I wanted to sell to Saw Chai who was working in Paris Pub".

The issue was whether the defendant had rebutted the presumption of trafficking on the balance of probabilities.

Held:

[1] The definition of "trafficking" in the Act is wide and includes not only buying and selling but also carrying concealing and keeping.

[2] That the presumption of trafficking was not rebutted on the balance of probabilities for the following reasons:

(a) the undisputed evidence of concealment.

(b) admission by the appellant that the drugs were bought for his friends.

(c) admission in the cautioned statement that the appellant wanted to sell the drugs to one Saw Chai.

[Appeal dismissed and the sentence confirmed.]

Cases referred to:
Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89
Akin Khan v. Public Prosecutor [1987] CLJ (Rrep) 40

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(i), 39B(1)(a), (2)

Other source referred to:
Shorter Oxford English Dictionary

For the appellant - Sidney Augustin (K. Siva Segara with him); M/s. Augustin Negrin & Co.
For the respondent - Aik Guan, DPP

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The appellant is charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) that on 20 December 1983 at about 12.50 a.m. at No. 8, Tepian Loke Yew, Off Jalan Loke Yew, Kuala Lumpur did on his own behalf traffic in a dangerous drug, to wit, 36.97 grammes of heroin, thereby committing an offence punishable under s. 39B(2) of the Act.

Immediately before his arrest the appellant was with three other male Chinese in a Honda Civic car bearing registration No. AAK 2646 which was stopped by the police at the place mentioned in the charge. The appellant was at the time of his arrest 20 years 10 months old.

Throughout the trial the appellant never disputed the fact that at the time of his arrest he had 10 small plastic packets of heroin concealed under the front part of his underpants.

The packets contained a total of 86.74 grammes nett of a light brown powdery substance which on analysis the chemist found to contain 36.97 grammes of heroin.

The prosecution case was straight forward. The heroin being 36.97 grammes, the appellant was presumed under s. 37(da)(i) to have been trafficking in the drug until the contrary is proved. Thus the learned Judge called upon him to make his defence.

The appellant gave his evidence on oath and also called five other witnesses. The crux of his defence is that he was at the material times a drug addict, and a severe one at that, and that the heroin found on his person was for his own consumption. Defence Counsel both in the Court below and before us valiantly canvassed the proposition that since there was overwhelming evidence that the appellant was a hard core addict at the time of his arrest, the presumption of trafficking has been rebutted on the balance of probability and that the heroin found on him was for his own consumption and not for trafficking.

It seems quite clear to us that the learned Judge accepted the evidence of the defence that the appellant was a drug addict on the day of his arrest and that in all probability the addiction was quite severe. Then the learned Judge asked himself whether the appellant, being an addict, could not also have been a drug trafficker within the meaning of the Act.

To satisfy himself the learned Judge considered the evidence of the defence relating to the 10 packets of heroin found concealed on the person of the appellant. The learned Judge found from the evidence that the appellant's drug addiction required him to use half a packet of heroin a day. The appellant in his evidence said that the whole amount would last him 30 days. He also said that he bought the 10 packets to share with his two friends and that the two friends had also contributed towards the purchase. Under cross-examination the appellant said that he had contributions from his friends to buy the 10 packets of heroin which cost RM600.

The defence also relied on the cautioned statement of the appellant made to DW2, Insp. Saliman. He said he gave the statement voluntarily. The intention of the defence was to show by way of a voluntary statement that the appellant was a drug addict. However in the cautioned statement itself in response to the question "Mengapa dadah yang didapati pada kamu itu banyak?" ("Why was the amount of drug found on you so much?") the reply by the appellant was "Sebab saya hendak jual kepada Saw Chai yang bekerja di Paris Pub." ("Because I wanted to sell to Saw Chai who was working in Paris Pub".)

It is quite clear then that although the learned Judge accepted the evidence that the appellant was a drug addict, he rejected his explanation of the 10 packets of heroin found on his person. He was satisfied that the appellant was trafficking in the drugs as charged and convicted the appellant.

"Trafficking" is defined in the Act as follows:

> "Trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity albeit often with sinister implication. See also the *Shorter Oxford English Dictionary*.

The definition of "trafficking" in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word "traffic" in the Singapore Drugs Act. In the Singapore provision to "traffic" in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v.Public Prosecutor* [1981] 1 MLJ 64.

Considering this case from the evidence of both the prosecution and the defence the facts proved to fall squarely into the definition of "trafficking" in our Act. The appellant was found in possession, custody and control of the said heroin the weight of which is more than 15 grammes. This invoked the presumption of trafficking under s. 37 of the Act. There is the undisputed evidence of concealment (10 packets of the heroin found concealed in the underpants of the appellant). The appellant also admitted that he bought the drugs for his friends and that he would distribute the drugs to the friends. Finally in his cautioned statement he stated that he wanted to sell the drugs to one Saw Chai working in Paris Pub.

To digress a little we would like to point out that the concluding paragraph of the judgment of the learned Judge was not couched on a clear language to reflect the proper test to be applied. See *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89. However after reading the whole of his judgment we are satisfied that what the learned Judge meant to say was that having viewed the totality of the evidence he was satisfied that the presumption of trafficking was not rebutted on the balance of probability. This Court had occasion to deal with a similar language lapse in a case also under s. 39B(2) of the Act. (*Akin Khan v. Public Prosecutor* [1987] CLJ (Rep) 40 which also referred to *Public Prosecutor v. Yuvaraj*.

In this case there was ample evidence to convict the appellant on a charge of trafficking in dangerous drug under the Act.

The appeal is accordingly dismissed and the sentence confirmed.

Also found at [1989] 2 CLJ 977